IN THE MATTER OF

The June 4, 2008 Disapproval of the Amended Gaming Ordinance of the Metlakatla Indian Community

Chairman's Response To Appeal

July 28, 2008

Counsel representing the Chairman's decision provides a response to the legal arguments raised by the Metlakatla Indian Community in this appeal.

INTRODUCTION

On May 29, 2008, the NIGC received a request from the Tribe to review and approve an amendment to the Metlakatla Indian Community Tribal Gaming Ordinance ("the amendment"). The amendment was approved by the Tribal Council on May 28, 2008, via Resolution No. 08-24. On June 4, 2008, the Chairman of the NIGC disapproved the amendment on the ground that it was contrary to the Indian Gaming Regulatory Act (IGRA) and NIGC regulations. Specifically, the amendment sought to authorize as Class II a bingo-based game that does not meet IGRA's definition of bingo and, as implemented, is a Class III facsimile of a game of chance. On June 7, 2008, the Community filed this appeal. The full Commission should affirm because the Chairman's disapproval was correct in every respect.

ARGUMENT

I. The Chairman Has The Authority to Disapprove Tribal Gaming Ordinances that Are Contrary to the Express Terms of the Indian Gaming Regulatory Act.

As a threshold matter, the Community argues, if not at great length, that the Chairman lacks the authority under IGRA to disapprove gaming ordinances that meet the requirements of 25 U.S.C. § 2710 (b)(2). The Community points out that 25 U.S.C. § 2710(e) states, "the Chairman shall approve such [an] ordinance … if it meets the requirements of this section." It points out as well that § 2710(b)(2) states that the "Chairman shall approve any tribal ordinance or resolution … if such ordinance or

resolution provides" for six different particular matters, including a tribe's sole proprietary interest in gaming, specified uses of net gaming revenue, annual audits submitted to NIGC, environment and public health responsibility, and an adequate system of background investigation and licensing. Likewise, so long as an ordinance addresses these things, the argument goes, the Chairman must approve it, regardless of what its other sections might provide. The argument fundamentally misreads IGRA, and the Commission should not credit it. The Chairman without question has the authority to disapprove an ordinance that attempts to authorize Class III gaming as Class II.

IGRA requires the Chairman to review and approve tribal gaming ordinances, and he must approve an ordinance before it is valid. 25 U.S.C. §§ 2710(b)(2) and (d)(1)(A). While IGRA requires ordinances to include certain provisions, 25 U.S.C. §2710(b)(2)(A)-(F), tribes often exercise their sovereign legislative powers and include additional provisions above and beyond these minimum requirements. Contrary to the Community's contention, IGRA does not require the Chairman to approve such additional provisions if they conflict with the language of IGRA itself. Indeed, the very sections the Community relies upon show this to be so.

Paragraph (e) of section 2710 states:

> The Chairman shall approve such ordinance or resolution *if it meets the requirements of this section.*

25 U.S.C. § 2710(e). (Emphasis added). Similarly, 2710(b) states with more particularity that:

> The Chairman shall approve any tribal ordinance or resolution concerning *the conduct, or regulation of Class II gaming* on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides [for the above-listed minimum requirements].

25 U.S.C. § 2710(b)(2). (Emphasis added.) This language is equally applicable to Class III gaming and Class III ordinances. 25 U.S.C. § 2710(d)(1)(A)(ii)(incorporating this language by reference for Class III gaming).

Not only, then, does § 2710(b)(2) require that an ordinance meet IGRA's minimum requirements for ordinances listed in §2710(b)(2)(A) – (F), one of the other requirements of "this section" of IGRA is that the ordinance purporting to authorize Class II gaming on Indian lands is, in fact, authorizing *the conduct or regulation of Class II* gaming. Insofar as he is charged with reviewing and approving Class II gaming ordinances, the Chairman necessarily has the authority to determine whether the gaming authorized by a Class II ordinance is, in fact, Class II.

While this Chairman has never had to review an ordinance specifically authorizing a Class II aid until now, this is not a case of first impression. The Chairman has reviewed clauses authorizing gaming on a specific parcel of land creating a so-called

site-specific ordinance. In those cases, the plain and unambiguous language of IGRA – the very same language that is at issue here – requires the Chairman to make an Indian lands determination when faced with a site-specific ordinance authorizing Class II gaming.

That is, IGRA only authorizes the Chairman to approve site-specific ordinances if it authorizes gaming on Indian lands, as IGRA defines the term. Without confirmation that the site-specific ordinance authorizes gaming on Indian lands eligible for gaming, the Chairman would have to disapprove the ordinance. To approve an ordinance that specifically permitted gaming on ineligible lands would authorize a tribe to offer gaming that IGRA prohibits. *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 908 (9th Cir. 2002) ("the statutory framework suffices to demonstrate that the NIGC must consider the legality of Class III gaming before approving … resolutions, ordinances, and management contracts…"). Moreover, the District Court for the Western District of New York insisted that the Chairman must complete such a determination as part of his duties:

> Having fully considered the purpose and structure of the IGRA, and the authority delegated to the NIGC by Congress, this Court rejects Defendants' contention that the NIGC Chairman is not required to make "Indian lands" determinations when he acts on a tribal gaming ordinance. To the contrary, whether Indian gaming will occur on Indian lands is a threshold jurisdictional question that the NIGC must address on ordinance review to establish that: 1) gaming is permitted on the land in question under the IGRA, and 2) the NIGC will have regulatory and enforcement power over the gaming activities occurring on that land.

Citizens Against Casino Gambling In Erie County (CACGE), 471 F. Supp. 2d 295, 303 (W.D. NY 2007). The court found error where the Chairman did not make a land determination regarding a site-specific ordinance. *Id.* In fact, the court in *CACGE* vacated the Chairman's ordinance approval because the Chairman did not make an Indian lands determination on a site-specific compact: "Because the Indian lands determination *is one that Congress placed in NIGC's hands*, the NIGC's 2002 ordinance approval is vacated . . . ." *Id.* at 303 (emphasis added).

Likewise here, when a tribal gaming ordinance or amendment specifically authorizes the conduct of Class II gaming in a specific manner, the Chairman must first determine whether or not that gaming qualifies as Class II. Under IGRA, Class III gaming is only legal if conducted in conformance with a tribal-state compact, 25 U.S.C. § 2710(d)(1)(C), and the operation of Class III gaming in the absence of a compact is a substantial violation of IGRA that per se justifies closure of a gaming operation. 25 C.F.R. § 573.6(a)(11). Without confirmation that the gaming being authorized as Class II is, in fact, Class II, the Chairman would have to disapprove the ordinance. To approve a Class II ordinance that specifically permits Class III gaming would be tantamount to authorizing a tribe to violate IGRA. In short, the Chairman is bound by statutory duty to determine whether the gaming activity contemplated by a "game-specific" ordinance should be classified as Class II or Class III.

II. The Amendment Was Inconsistent With IGRA

As the appointed head of the federal agency charged with the responsibility for overseeing Indian gaming, the Chairman has the authority to determine matters related to the classification of gaming under IGRA. In this matter, the Chairman determined that the Tribe's amendment was inconsistent with IGRA in a number of ways, and he was therefore duty bound to disapprove the ordinance.

a. The Chairman has the authority to interpret IGRA

The Community argues that the Chairman is attempting to "graft a fourth statutory requirement for bingo onto the IGRA that Congress did not intend." *Appeal* at 7. In fact, what the Chairman's disapproval does is to simply interpret IGRA's provisions. Court opinions have supported the NIGC's broad authority to do so as the administrator of IGRA. *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty.*, 46 F. Supp. 2d 689, 707 (W.D. Mich. 1999) (where the court found the question of restored land to be within the NIGC's "special competence" and although it "acknowledge[d] that the nature of the determination required in the instant case is distinct from many of the primary duties of the NIGC [monitoring and compliance]," the Court nevertheless yielded to NIGC's primary jurisdiction over the restored lands issue); *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003); and *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney of the W. Dist. of Mich.* 369 F.3d 960, 965 (6th Cir. 2004). Congress created the NIGC and gave it the authority to take the action necessary to implement its provisions. 25 U.S.C. 2706(b)(10). By disapproving the amendment, the Chairman simply exercised that authority. The Chairman's decision is therefore more than simply "musings" as the Community contends. *Appeal* at 8. "The well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Bragdon v. Abbott,* 524 U.S. 624, (1998) (quoting *Skidmore v. Swift,* 323 U.S. 134,139-140 (1944)), and "we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer...." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984)(footnote omitted).

b. The amendment allows more than "auto-daub;" it allows "auto-everything"

The Community's appeal frames this dispute as whether or not an "auto-daub" may be used as an aid to the play of bingo. *Appeal* at 7. This characterization is inconsistent with the Chairman's stated reasons for disapproving the ordinance. The Chairman did not disapprove the ordinance because it permitted auto-daub; he disapproved it because it permitted auto-everything. In his disapproval, the Chairman stated, "I understand that the amendment is intended to authorize fully electronic, fully

automated, multi-player bingo games." *Disapproval* at 3. Nowhere in the Community's appeal does it specifically dispute this understanding of how the aid is to be used.[1]

Rather, the Community questions the Chairman's understanding of bingo in general. In doing so it attempts to muddy the issue presented to the Chairman. The Community acknowledges that the Chairman does not dispute that an auto-daub feature could be considered an aid. *Appeal* at 7. However, the Community argues — incorrectly — that the Chairman disapproved the amendment because auto-daub makes the game a Class III facsimile. The Chairman's decision said nothing of the sort. The Chairman said, rather, that IGRA restricts the use of an aid that would fully automate the game of bingo so as to change the fundamental characteristics of the game. That is why the Chairman specifically interpreted the Community's amendment as allowing "a 'one touch,' fully automated game based on bingo that does not meet the definition of bingo under IGRA, does not meet the definition of 'game similar to bingo' under IGRA, and is a facsimile of a game of chance." *Disapproval* at 1.

The Community's appeal continuously attempts to confuse the issue by citing instance where auto-daub is allowed. *Appeal* at 12. It is irrelevant how bingo is played on U.S. military facilities. Bingo played on those facilities is not governed by IGRA or regulated by the NIGC. Likewise, it is irrelevant what features are allowed by the State of Alabama in the play of bingo. Further, the Community's historical examination of an auto-daub aid feature for bingo is misleading because those aids were used in conjunction with a live ball draw, while the game at issue here is wholly electronic and plays entirely automatically.

The Community's appeal fondly quotes the Ninth Circuit's decision that the game Megamania qualifies as bingo. *Appeal* at 8. Unfortunately, the Megamania game as examined in that case is fundamentally different than the aid authorized by the amendment. The Chairman, in his disapproval, recognized this difference and noted that the Court's holding was "heavily dependent on the facts—the characteristics of the game and the manner in which it was played." *Disapproval* at 5. The Chairman determined that the aid as proposed in the amendment would be substantially different from the aid as presented in Megamania and therefore a classification analysis should result in a different outcome. In Megamania, there were live ball draws, the players themselves were covering the numbers on their cards, and there was the possibility of sleeping a bingo. The aid contemplated by the amendment would automate all of these functions, including covering for the player.

The appeal wrongly implies that that Chairman's "understanding of bingo is based on how the game was 'traditionally' played." This is a shallow attempt to place the Chairman's interpretation of IGRA in contradiction to the Ninth Circuit's caveat that,

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[1] In footnote 3 of its appeal, the Community questions whether the Chairman understands the aid described in the amendment by referencing bingo minders used in bingo halls. However, the Community does not state, nor does the Chairman believe, that bingo minders are analogous to the game contemplated by the Community's amendment. Bingo minders as a general rule, do not necessarily play themselves, and they are used in games with a live ball caller.

"[W]hatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhood or home towns might discover, IGRA's three explicit criteria constitute the sole legal requirements for the game to count as class II bingo." *United States v. 103 Electronic Gambling Devices,* 223 F.3d 1091, 1096 (9th Cir. 2000).

To the contrary, the Chairman's understanding of bingo is based upon the text of IGRA itself, as well as the important distinction IGRA makes between Class II and Class III gaming. This is the distinction that its Congressional drafters made between technologic aids and facsimiles and, more broadly, between gaming in bingo halls in 1988 and full blown casino gaming found in Las Vegas and Atlantic City. As the Chairman expressed in his disapproval, the courts that have reviewed bingo and facsimiles have not, through no fault of their own, delved far enough into the intentions of Congress. Congress, while clear that tribes could use technology, was equally clear that the technology did not transform the game into a facsimile. Or, in the words of IGRA's drafters:

> [S]uch technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. at 3079.

Beyond these points, the Community disputes that the competition in a bingo game is defined by the ability to sleep. *Appeal* at 9. Rather, it asserts that the competition as defined by IGRA lies in the player being the first to cover a game-winning pattern. *Id.* This is true as far as it goes but misunderstands the Chairman's decision and ignores IGRA's additional requirement that players are to cover "when" objects are drawn.

The Chairman did not state that the competition in bingo is defined by sleeping. To the contrary, sleeping is evidence that there competition among players in bingo. This arises from the statutory requirement that players cover "when" objects are drawn. This requirement means that if a player fails to cover "when" a number is drawn, he or she may "sleep" a bingo – fail to cover the game-winning pattern and not win the game. The Community's reading here, then, reads the "cover when" requirement out of IGRA. What's more, the Chairman's decision points out that in the game described by the amendment, there is no "first" player to obtain a winning pattern. IGRA specifically requires that bingo is won by the "first person covering" a winning pattern. The Community's interpretation reads this requirement out of IGRA as well.

The Chairman rightfully found that a wholly automated game eliminates the statutorily require player participation from bingo. Likewise the Chairman found that the exception contained in the definition of facsimile requires some player participation.

c. The Chairman rightfully discussed games similar to bingo

The Community argues that it was inappropriate for the Chairman to discuss games similar to bingo because this issue was not before him. *Appeal* at 13. However, the Chairman was compelled to clarify that one-touch, auto-everything games are not acceptable in Class II at all—not just for bingo. There was no sound regulatory reason for the Chairman to limit his decision to bingo and potentially allow the claim that a fully automated game is permissible as a Class II "game similar to bingo."

d. The aid described in the amendment is a Class III facsimile

We disagree with the Community's interpretation of the definition of electronic or electromechanical facsimile. *Id.*[2] Additionally, we disagree with the Community's contention that the Chairman took issue with or disregarded the NIGC's own regulations. NIGC regulations cannot allow something prohibited by statute. A wholly electronic copy of a bingo game is a facsimile. Therefore, the NIGC regulations must not be interpreted to permit as Class II such wholly electronic copy.

The Community argues that under the NIGC regulations, as long as bingo is being played on a multi-player network, it is exempted from the definition of facsimile. Again, we disagree. As his decision makes clear, in the auto-everything game, players are not, in fact, playing against one other as IGRA requires. The machines are simply announcing winners. There is no player participation and no competition as IGRA requires, and the games contemplated by the amendment do not satisfy IGRA's definition of Class II gaming.

III. A Decision on this Appeal Should Not Be Deferred

Finally, the Community's appeal raises the question of the Chairman's ability to fairly adjudicate a decision that he has made. *Appeal* at 18. Specifically, the Tribe questions the Chairman's willingness to admit error or change his position in relation to his disapproval of the amendment. While this is an interesting proposition, it assumes that the Vice Chairman will disagree with the Chairman's initial decision. The argument that there is no possibility that the Chairman will reverse his decision completely ignores that the Chairman has voted to reverse his own decision in other matters. For instance, the Chairman disapproved the Ponca Tribe of Nebraska's Tribal Gaming Ordinance because he found that it authorized gaming on lands that did not qualify for gaming under IGRA. On appeal, the Chairman joined the full Commission in reversing his ordinance disapproval. *See In Re: Gaming Ordinance of the Ponca Tribe of Nebraska* (December 31, 2007). Further, the Tribe cites no case law that would restrict the Chairman in such a situation. In fact, there is case law to suggest just the opposite. *See Withrow v. Larkin*, 421 U.S. 35 (1975); *National Labor Relations Board v. Donnelly Garment Co.*, 330 U.S.

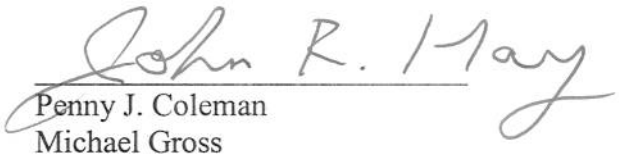
[2] The Community's appeal relegates the test courts have used for distinguishing an aid from a facsimile to a footnote. *Appeal* at 16, fn. 14. All of the cases cited by the Community stand for the proposition that facsimiles are electronic copies.

219 (1947). The Chairman should not defer decisions simply because those actions may be appealed. Such a remedy could lead to paralysis of the agency's core functions.

For all of the foregoing reasons, the Commission should affirm.

Dated: July 28, 2008

Respectfully submitted,



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